STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Gage, P.J., and Cavanagh and Wilder, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DANIEL JESSE GONZALEZ,

Defendant-Appellant.
_____/

Supreme Court No. 120363

Court of Appeals No. 220715

Lower Court No. 98-015361-FC

SAGINAW COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Saginaw County Circuit Court by jury trial, and a Judgment of Sentence was entered on June 17, 1999. A Claim of Appeal was filed on July 2, 1999 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated June 25, 1999, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This Court now has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WAS THE EVIDENCE, EVEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, INSUFFICIENT TO SUPPORT A CONVICTION FOR FIRST-DEGREE PREMEDITATED MURDER BEYOND A REASONABLE DOUBT?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answers, "No".

II. BECAUSE THE ISSUE OF CREDIBILITY WAS "CLOSELY DRAWN", DID THE COURT COMMIT REVERSIBLE ERROR BY FAILING TO *SUA SPONTE* GIVE A CAUTIONARY INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY WITH REGARD TO THE PROSECUTION'S KEY WITNESS, WOODROW COUCH, IN VIOLATION OF DEFENDANT'S RIGHT TO A PROPERLY INSTRUCTED JURY?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answers, "No".

III. WAS DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL FAILED TO REQUEST A CAUTIONARY INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY WITH RESPECT TO THE TESTIMONY OF WOODROW COUCH?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answers, "No".

STATEMENT OF FACTS

Defendant-Appellant Daniel Jesse Gonzalez was charged with and convicted of first-degree premeditated murder, MCL 750.316(a), felony murder, MCL 750.316(b), first-degree criminal sexual conduct, MCL 750.520(b), and arson, MCL 750.72, after a jury trial in the Saginaw County Circuit Court, the Honorable Lynda Heathscott presiding.

On February 14, 1998, at 0313 hours, the Saginaw Fire Department received a fire call to 141 Bates Street in Saginaw (18a). Lieutenant Pete Garcia searched the various apartments on the floor until he eventually opened apartment no. 3. The place was filled with smoke. The windows were in tact. He entered a rear bedroom to discover flames and a dead body on the bed. Garcia and his unit uncovered fires in a recliner, on a stereo set and in the oven. The one in the recliner was caused by charcoal underneath the chair (12a-17a).

Saginaw Fire Department Lieutenant James Gonzales also responded to the aforementioned blaze. He walked in back of the apartment building at 141 Bates to view smoke coming from a first floor apartment window. The window itself was open and bent outward and the screen on the window pushed out and partially hanging. The lieutenant then noticed fires in at least two locations in the dwelling unit (18a-23a).

Saginaw Fire Department Fire Marshall Tyronza Snowden investigated the fire at 141 Bates and concluded that someone intentionally set the fire, which burned in the range of 200 to 500 degrees, about 15 to 20 minutes before being extinguished (39a-45a). There were multiple points of origin for the fire. The person placed charcoal briquettes on the top of the victim's entertainment center. The arsonist further put charcoal briquettes on the floor by and under a

stuffed chair. The electric stove had been turned to broil and a toaster, a small table lamp and two or three gym shoes placed inside the oven. The final point of origin was the bed in the bedroom, which contained a severely burned body. The victim had been especially burned in his or her lower extremities. Only the metal bedsprings remained of the bed (24a-36a).

Saginaw Police Department Officer Randi Tinglan recovered a smoldering purse from a nearby neighbor. Identification in the purse showed the owner to be a Carol Easlick. The purse smelled of gasoline (46a-48a).

Saginaw Police Department Detective Ronald Gwizdala also investigated the fire. He seized a baseball bat located near the entrance way to the bedroom. The officer also took the victim's jewelry at the time of the autopsy (50a-55a).

June Easlick is Carol Easlick's mother. She testified that her 33-year-old daughter was a "slow learner." At the time of her death, she used to keep an aluminum baseball bat and a crowbar in her apartment. The mother identified jewelry routinely worn by her daughter (56a-60a).

Forensic pathologist Dr. Kanu Virani conducted an autopsy on Carol Easlick. He found Easlick wearing only a pulled up red t-shirt. Partially burnt plastic bags and blood covered the head and face at (61a-63a). Virani found a large three and one-half inch long gaping wound on the top, middle part of the head, two parallel gaping wounds one and one-half inches long on the left side of the frontal area, two gaping wound on the right side of the forehead, and a two and one-half inch gaping wound across the right eye. There were lacerations on the nose, and a small purple wound on the front of the chest and sternum area. Burns covered the rest of the body; the most serious of which covered the lower extremities (68a-70a).

An internal examination showed a fracture of the hyoid bone and bleeding in the small muscles of the neck. Both findings indicate pressure on the neck area from both sides. The likely cause of these injuries was strangulation (71a-72a).

The doctor also found multiple skull fractures forming a rounded pattern in the frontal area of the skull. The fractures caused bleeding around the brain as well as bruising on the surface of the brain. The likely object used by the assailant was an elongated, cylindrical, hard object such as a baseball bat or crowbar. Whoever used the bat on the victim used a tremendous amount of force to cause the injuries to the head (72a-74a, 82a).

The lack of presence of smoke or soot inside of the throat or trachea indicated that the victim was not actively breathing when the fire occurred. The victim died of blunt force head trauma, with strangulation being a contributing cause of death. The witness could not determine whether the head trauma or the strangulation occurred first. Easlick, at most, would have been alive but unconscious, for a few minutes after the injuries until the circulation stopped. The witness believed the victim was tied to the bed after being killed and when the fire happened. A finding of sperm in the mouth would indicate that the victim was dead when the sex act occurred (74a-79a).

Kyle Ann Hoskins, a forensic scientist with Michigan State Police, examined the crime scene. She located cigarette butts from the living area and the baseball bat. Footwear impressions taken from the kitchen floor were dissimilar to Defendant's shoes (83a-85a). A bat and a crowbar were seized from the dwelling. An electrical cord had been used to bind the victim to the bed. Two blue plastic bags covered the victim's head; both knotted around the head. Both bags melted due to the fire (87a-89a).

An analysis of swabs taken from the victim's vagina indicated the presence of acid phosphatase, a component of seminal fluid. The oral and rectal swabs were negative for acid phosphatase. However, a microscopic examination of the swabs found sperm on all, with the most sperm found in the vagina. Material samples from each of the three orifices were sent to outside laboratories for DNA analysis along with blood samples taken from Appellant, the victim, and a Woodrow Couch. Hoskins examined the bat and crowbar taken from Easlick's apartment. No blood or other trace evidence was found (90a-97a).

Sgt. Galvan Smith, a latent fingerprint expert with the Michigan State Police, collected evidence from Easlick's apartment. He found no latent prints on items taken from the oven. Smith was able to develop latent prints on plastic bags that were taken from a utility room within the apartment, the bags being similar in color to those found on the head of the victim. The prints were not those of the victim. No prints were found on the bat or the tire iron (98a-103a).

Michael Walter, Easlick's neighbor, visited the woman on February 13, 1998, at about 7:30 p.m. As he approached her front door, two men in their twenties were just behind him. The three entered the apartment together. Easlick identified one of them as Daniel. Walter identified Defendant as Daniel. Gonzalez played with a tape player. After a while, Easlick and Defendant spoke in the hallway. Easlick seemed terrified afterward (104a-109a).

Penny Kuhlman, a close friend of Easlick, said that Easlick spoke to her regarding Defendant, describing their relationship as like a mother and son. On February 13, 1998, Kuhlman arrived home about 9:30 p.m. and observed that Easlick had left two messages on the answering machine. When Kuhlman called her back at 10:00 p.m., Easlick indicated that she could not talk at that time, that she was busy, and that she would call back. Easlick called back at

midnight, but the phone only rang once. When Kuhlman pushed *69, Easlick's number appeared. When Kuhlman then called Easlick, she heard in the background a TV and voices (110a-115a).

Brad Johnson, a friend of Gonzalez, used to socialize with Defendant and Couch. On February 13, 1998, he met Easlick about noon. Gonzalez told him three days later that the woman was dead (116a-117a, 125a). Defendant told Johnson that he had read or heard that Easlick had been beaten to death with a crowbar or bat, and burned. Defendant did not describe the circumstances of the burning. According to the witness, Defendant told him someone tried to make the fire look accidental. Defendant also allegedly said the victim had been raped. The witness saw Gonzalez on Sunday night, February 15, and Defendant said nothing to him about the crime (118a-129a).

Carrie Spencer, a reporter for the Saginaw News, covered the story about Easlick's death. The story Spencer wrote on Sunday, February 15, announced the arson and the murder of Easlick. The police had not announced the cause of death and the newspaper stories did not disclose any information regarding the cause of death (129a-134a).

Tabitha Naylor, a friend of Gonzalez's, saw him Sunday after the fire. He asked her if she had heard about Easlick's death. Naylor then said to him that she thought Gonzalez might have set the fire. Gonzalez suddenly grabbed her throat in a rage (135a-139a).

Nancy Couch is the mother of Woodrow and Amanda Couch. At about 10 pm on February 13, 1998, Couch and her daughter returned home from shopping to find Woodrow laying on a sofa. Her friend Luna came to the house about 11:00 p.m. and the two women departed about midnight at which time Woodrow was still home (142a-148a). Mrs. Couch

returned home at about 2 am to find her children sleeping. A constant thumping downstairs woke the witness at about 2:30 or 3:00 a.m. Gonzalez had been pounding on a window. Gonzalez then spent the night at the witness' home, departing that morning. Later that weekend, Gonzalez left a message on Couch's answering machine directing Woodrow to read the newspaper (148a-154a).

Elisa Luna worked on February 13, 1998 until 11:00 p.m. and then went to Nancy Couch's home. She arrive at the house about 11:15 p.m. to find both Woodrow and Amanda present. The two women departed about 12:30 a.m. Woodrow was still there. They returned home around 2 a.m. (155a-158a).

Carolyn Martinez, a phlebotomist for Covent Laboratory drew Gonzalez's blood at the request of the Saginaw Police Department (159a-161a). Brenda Moffitt, a phlebotomist for Quest Diagnostic medical laboratory, drew blood from Woodrow Couch at the request of the police (162a-164a).

Saginaw Police Detective James Livingston spoke with Gonzalez on February 20, 1998, while Defendant was in custody. Gonzalez denied returning to Easlick's apartment during the evening of February 13. He further denied having sexual relations with Easlick (167a-169a). Gonzalez did admit being at Easlick's apartment earlier that day in the company of Brad Johnson (176a).

Woodrow Couch III, also known as "Chip", is a seventeen-year-old friend of Gonzalez. On February 13, 1998, at about 5:00 p.m. he and Gonzalez walked to Easlick's apartment (177a-179a). They walked in behind an older white guy who had a white car (179a-180a). They watched television and talked. Upon leaving Easlick's residence about 30 minutes later, they went to Couch's home. The two played on the Play Station. Gonzalez was at the house when the

witness fell asleep (181a-183a). Couch awakened when his mother opened the door for Defendant later that night. Defendant spent the night in Couch's room, while Couch slept on the couch. Defendant was gone when the witness awoke the next morning (184a-187a).

On a later date, Gonzalez left a message on Couch's answering machine which directed Couch to check the newspaper. The two subsequently talked and Gonzalez allegedly admitted returning to Easlick's apartment, having sexual relations with her, hitting the victim with a baseball bat, and tying her up (188a-190a)

On cross-examination, Couch admitted to having a fuzzy memory of events on the night of Easlick's death. Gonzalez was with him when Couch's mother returned from the mall (192a-196a). The first time Couch spoke with police, he told them that he had not been at Easlick's apartment and that Gonzalez had been with him the entire evening (198a). He did not tell the police about Defendant until the third interview (199a). Couch had been drinking a large amount of vodka and orange juice the night of the offense, and was "pretty buzzed" (202a-203a, 205a). Couch denied having sex with Easlick (203a). On Saturday, February 14, Gonzalez "acted cool" (208a). Couch testified that Easlick's apartment was only a couple blocks from his house (198a).

Craig Culver, a former boyfriend of Easlick, testified Easlick would not voluntarily engage in anal sex (209a).

Stephen Milligan conducts DNA analysis for the Michigan State Police. He compared the blood samples taken from Gonzalez and Couch to the swabs used to collect samples from Easlick's mouth, vagina and rectum. There was an insufficient amount of DNA to detect genetic information from the tissues taken from the victim's mouth and rectum (210a). Couch was eliminated as a donor (212a-214a). There was a four-probe match between the sperm donor of

the DNA found on the vaginal swab and Daniel Gonzalez (214a). The likelihood of another person having the same DNA markers is 18.7 million to one (215a).

Keith Lamont, a Michigan State Police fire debris specialist, investigated the fire at the victim's residence, including the collection and preservation of fire debris. Testing showed the presence of medium petroleum distillates, such as charcoal lighter fluid or paint thinners. However, the charcoal located in the apartment did not contain those distillates. He also found gasoline on Easlick's purse (217a-218a).

Anita Matthews, a forensic scientist at LabCorp in North Carolina, specializes in DNA analysis (219a). She conducted a polymerase chain reaction test (PCR), which allows analysis of small amounts of DNA (220a). Samples provided by the Michigan State Police including a rectal swab, an oral swab, material from a jacket, as well as blood samples from Easlick, Couch and Gonzalez (221a-222a). Twelve areas of DNA were examined. The DNA from the rectal swab could have come from Gonzalez but not from Couch. The DNA from the oral swab did not match Couch but Gonzalez could not be excluded. The DNA from a jacket matched Gonzalez's DNA. The likelihood of randomly selecting an unrelated individual with a DNA profile consistent with a sperm fraction of the rectal swab in Gonzalez's varied from one in 60,500 for the southeastern Hispanic population to one in 61,000 for the southwestern Hispanic population (223a-231a).

After the prosecution rested, the defense called Saginaw County Police Detective Sandra Paetz. She testified that she interviewed Gonzalez twice, once on February 20 and again on April 20, 1998. Gonzalez admitted having voluntary sexual relations with Easlick, including both vaginal and anal intercourse. However, Gonzalez denied killing the victim. He further stated that

Woodrow Couch was with him. Moreover, he departed Easlick's apartment first leaving Couch there, and Gonzalez waited for Couch at Couch's home. It was Defendant's understanding that when he left, it was Couch's turn to have sex with Easlick (232a-237a).

Jesse Alvarado is Gonzalez's father and a male friend of Easlick, with whom he was romantically involved for three years. He testified that Cruz Lazano telephoned on February 15 to report that Easlick had died in a fire after being tied and gagged. Lazano's wife was related to Easlick's sister's husband (241a-243a).

The prosecutor called Cruz Lazano as a rebuttal witness. He confirmed that he was a relative of Easlick's and a friend of Jesse Alvarado. He denied calling Alvarado. Rather, Alvarado called him. He denied telling Alvarado any non-public details of the crime. Moreover, he was in Mt. Pleasant at the time of the victim's death (244a-245a).

The jury convicted Gonzalez on all charges (308a). The Court imposed a 10 to 20 year prison term for the arson count, 30 to 50 years for the criminal sexual conduct charge, and life imprisonment without parole for first degree murder (309a-310a).

After appealing as of right, the Court of Appeals affirmed in part and vacated in part in an unpublished opinion dated June 19, 2001. Defendant's convictions for first-degree premeditated murder and felony murder were affirmed. His convictions for arson and first-degree criminal sexual conduct were vacated (Gage, PJ, and Cavanagh and Wilder, JJ)(313a). A timely motion for rehearing was decided by an order issued on September 18, 2001, ordering a remand for correction of the Judgment of Sentence pursuant to People v Bigelow, 229 Mich App 218, 220-221 (1998)(11a). In an order dated November 19, 2002, this Court granted leave to appeal (317a).

I. THE EVIDENCE, EVEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTON, DID NOT SUPPORT A CONVICTION FOR FIRST-DEGREE PREMEDITATED MURDER BEYOND A REASONABLE DOUBT.

STANDARD OF REVIEW AND ISSUE PRESERVATION

The entire record is reviewed when determining whether the evidence as a whole is sufficient to sustain a conviction. People v Petrella, 424 Mich 221, 269 (1985). The de novo standard applies to the issue of sufficiency of the evidence. People v Wolfe, 440 Mich 508, 513-516 amended 441 Mich 1201 (1992). The issue was not preserved by a motion for directed verdict. However, this Court may still examine the issue even if not preserved. People v Wright. 44 Mich App 111 (1972).

DISCUSSION

This court, in reviewing lower court decisions in examining the sufficiency of the evidence, must read the lower court record in a light most favorable to the prosecution. An appellate court's role in such an examination is not to retry the case, with evidence, or assess the credibility of witnesses. People v Herbert, 444 Mich 466 (1973); People v Hampton, 407 Mich 354 (1979).

The difference between first-degree and second-degree murder is that the former requires the element of premeditation and deliberation and such lapse of time as will give the assailant an opportunity to calculate his or her purpose and form the intent to kill. People v Case, 7 Mich App 217 (1967). Among the factors to be considered in

determining whether or not premeditation and deliberation existed are: (1) the nature of any prior relationship between the defendant and the victim, indicative of motive; (2) the defendant's alleged acts before the killing; (3) the facts and circumstances of the killing itself and (4) the defendant's claimed conduct after the killing, suggesting a scheme or plan. People v Brown, 137 Mich App 396 (1984); see also People v Burgess, 96 Mich 390 (1980); People v Germain, 91 Mich App 154 (1979).

Carol Easlick described to friends the nature of her relationship with Gonzalez as that of a mother and son (110a). The killing evidenced a mentally unbalanced assailant. The person strangled, bludgeoned, suffocated, and incinerated the victim. Each act alone would have been sufficient to cause death. The likely cause of death was beating from the blunt force head trauma. The strangulation was a contributing cause of death (75a). The assailant must have repeatedly struck Easlick with a great deal of force. The blows resulted in the skull both fragmenting and fracturing into several pieces (74a). The placing of the plastic bags over the victim's head and setting the bed on fire were incidental, after death acts (77a-79a). The force of the blows would seem to show a rage, a fury and an uncontrolled anger toward Easlick. The facts fit a case of impulsive violent wrath rather than a deliberate and premeditated killing.

There is no dispute that the post-death acts show an intent to destroy evidence of the killing. The systematic nature of the acts are in contraposition to the killing itself. The jury likely mixed the circumstances of the killing and the after death desecration of the body rather than separately examining the two events. The evidence does not support the jury's finding of first-degree premeditated murder.

II. BECAUSE THE ISSUE OF CREDIBILITY WAS "CLOSELY DRAWN", THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO *SUA SPONTE* GIVE A CAUTIONARY INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY WITH REGARD TO THE PROSECUTION'S KEY WITNESS, WOODROW COUCH, IN VIOLATION OF DEFENDANT'S RIGHT TO A PROPERLY INSTRUCTED JURY.

Woodrow Couch testified at trial that on February 13, 1998, at about 5:00 p.m., he and Defendant Gonzalez walked to Ms. Easlick's apartment (177a-179a). They watched television and then returned to Couch's home, where they played video games on Play Station. Couch testified that Gonzalez was at the house when Couch fell asleep (180a-183a). Couch woke up when his mother opened the door and let Gonzalez into the house. Gonzalez then asked Couch if he could spend the night. Gonzalez was gone when Couch awoke the next morning (184a-187a). A day or more later, Gonzalez allegedly phoned Couch and left a message on the answering machine to check the newspaper (188a). When they later met, Gonzalez allegedly admitted returning to Ms. Easlick's apartment, being in the bedroom, hitting her with a baseball bat, and tying her up (188a-190a). Couch admitted to having a fuzzy memory of the events on the night of Ms. Easlick's death. (192a-193a).

The statement that Defendant Gonzalez made to Detective Paetz conflicted sharply with Couch's version of the evening. Det. Paetz testified that she interviewed Defendant Gonzalez on April 20, 1998. During the two-hour interview, Defendant admitted that he had sex with Ms. Easlick. Defendant also indicated that he and Woodrow Couch arrived at Ms. Easlick's apartment between 7:30 and 8:00 p.m. and that they stayed until about 2:30 a.m. When Defendant left Ms. Easlick's apartment about 2:30 a.m., it was his understanding based on

conversations with Ms. Easlick and with Woodrow Couch that it was Couch's turn to have sex with Ms. Easlick. Defendant further stated that after he left Ms. Easlick's apartment, he went to Couch's house and waited on the back porch until Couch arrived (232a-238a). Clearly, there was evidence from which the jury could believe that Woodrow Couch was involved in the commission of this crime.

The trial court gave the jury general instructions concerning the credibility of witnesses, according to standard Criminal Jury Instruction CJI2d 3.6. (286a-288a). However, the court failed to give any specific cautionary instructions concerning the unreliability of accomplice testimony. CJI2d 5.5, 5.6.[1] The court's failure to give a special cautionary instruction on

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[1] CJI2d 5.5 provides:
(1) Before you may consider what [name witness] said in court, you must decide whether [he/she] took part in the crime the defendant is charged with committing. [Name witness] has not admitted taking part in the crime, but there is evidence that could lead you to think that [he/she] did.
(2) A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.
(3) When you think about [name witness]'s testimony, first decide if [he/she] was an accomplice. If, after thinking about all the evidence, you decide that [he/she] did not take part in this crime, judge [his/her] testimony as you judge that of any other witness. But, if you decide that [name witness] was an accomplice, then you must consider [his/her] testimony in the following way:

CJI2d 5.6 provides:
(1) You should examine an accomplice's testimony closely and be very careful about accepting it.
(2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.
(3) When you decide whether you believe an accomplice, consider the following:
(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

accomplice testimony was reversible error, in violation of Defendant's constitutional right to a properly instructed jury. US Const, Ams V, VI, XIV; Const 1963, art 1, §§17,20; People v McCoy, 392 Mich 231 (1974).

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

Defense counsel did not request a special instruction on the unreliability of accomplice testimony. However, the trial court had a duty to *sua sponte* instruct the jury on the unreliability of accomplice testimony, even in the absence of a request or objection, where, as here, the issue of credibility was "closely drawn". People v McCoy, supra, 240. In McCoy, supra, 240, the Court held that after publication of that opinion, it would be reversible error to fail to give a special cautionary instruction regarding the unreliability of accomplice if requested, and "if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge."

Forfeiture v. Waiver

At Defendant's trial in 1998, the trial court instructed the jury and then asked if the parties agreed with the court's instructions. After counsel approached the bench, the trial court read the omitted specific intent instruction. The trial court then asked counsel if there were further objections

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(b) Has the accomplice been offered a reward or been promised anything that might lead [him/her] to give false testimony?

(c) Has the accomplice been promised that [he/she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his/her] testimony?

[(d) Does the accomplice have a criminal record?]

4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

to the court's instructions other than those that had been placed on the record. Both parties stated that they did not have any objections (304a-307a).

Defendant recognizes that in People v Carter, 462 Mich 206, 215-216 (2000), the Court discussed in detail the related concepts of appellate forfeiture and appellate waiver. The majority of the Court wrote, per Chief Justice Weaver, that a waiver precludes any substantive appellate review of a party's claim of error, but a forfeiture merely limits the review to a stricter standard for relief:

> The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. People v Carines, 460 Mich 750, 762-765; 597 NW2d 130 (1999). Counsel may not harbor error as an appellate parachute. People v Pollick, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting People v Hardin, 421 Mich 296, 322-323; 365 NW2d 101 (1984). "Deviation from a legal rule is `error' unless the rule has been waived." United States v Olano, 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).
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> Waiver has been defined as "the `intentional relinquishment or abandonment of a known right.'" Carines, supra at 762-763, n 7, quoting Olano, supra at 733. It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." Id. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." United States v Griffin, 84 F3d 912, 924 (CA 7, 1996), citing Olano, supra at 733-734. Mere forfeiture, on the other hand, does not extinguish an "error." Olano, supra at 733; Griffin, supra at 924-926.
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> It is the difference between waiver and forfeiture that makes the present case distinguishable from the cases of People v Howe, 392 Mich 670; 221 NW2d 350 (1974), and People v Smith, 396 Mich 109; 240 NW2d 202 (1976). While the present case deals with waiver, Howe and Smith addressed situations in which the error was forfeited. Griffin provides a clear example of the effect of this difference. In Griffin, the court concluded that the defendant waived any objection to a jury instruction because his counsel affirmatively approved the instruction. Griffin, supra at 923-924. This approval extinguished any error. Id. However, counsel's approval of the instruction did not preclude the court from the reviewing a

> codefendant's challenge to the instruction. Codefendant's counsel, rather than affirmatively approving the instruction, failed to object to the instruction. The failure to object qualified as a forfeiture, and the court reviewed the instruction for plain error. Id., 924-926. People v Carter, 462 Mich at 214, 215-216.

In Carter, the Court held that even though, as the prosecution conceded, the trial judge clearly erred in its response to a jury request for the rereading of testimony, the defendant waived any objection to the claimed error by affirmatively agreeing to the trial court's erroneous response. Accordingly, the claimed error was "extinguished," rather than merely forfeited, and the Court did not review the record under a plain error analysis. 462 Mich at 219-220.

In the instant case, defense counsel did not object at trial, but he did not specifically waive this issue, either. In the absence of an express waiver of the specific instruction at issue, an appellate court may still grant relief for a plain error that "seriously affected the fairness, integrity or public reputation of judicial proceedings." People v Carines, 460 Mich 750, 774 (1999). Defendant notes that the Court of Appeals, in two published cases, has broadly interpreted and extended Carter to find waiver where a party indicated their general satisfaction with the trial court's instructions at the conclusion of the charge to the jury. People v Lueth, ___ Mich App ___; 2002 WL 31473816 (CA No. 226717, 11/1/02); People v Ortiz, 249 Mich App 297 (2001). However, both Carter and United States v Griffin, 84 F3d 912 (CA 7, 1996), which this Court relied on in Carter, make it clear that a party must affirmatively approve the specific instruction in question. In Carter, the defense attorney affirmatively approved of the trial court's response to the jury's question. People v Carter, supra, 215. In Griffin, 84 F3d at 924, the defense attorney explicitly confirmed the district court's belief that the defendants "would prefer 53A." See also People v Herron, 464 Mich 593, 607 fn 8 (2001).

Plain Error

Defendant recognizes that in People v Carines, supra, the Court set forth a general rule that in the absence of an objection or request for specific jury instructions, review of allegedly defective jury instructions is warranted only when the failure to give such instructions constituted "plain error". See also People v Grant, 445 Mich 535, 547-549, 553 (1994). In Carines, the Court "reaffirmed" its prior decision in Grant, which adopted the "plain error" standard from United States v Olano, 507 US 725 (1993). Under that rule, an error may be considered on appeal if: 1) an error occurred, 2) the error was plain, 3) and the plain error affected substantial rights. Olano, supra, 731-734. The Court in Carines, supra, 763, citing Olano, at 734, stated that this third requirement normally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The Court in Carines, supra, 764, specifically reaffirmed its prior holding in Grant, which stated with respect to this requirement that:

> "a plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic." Grant, supra, 553.

Defendant believes that the Court's holding in McCoy already incorporates such a "plain error" standard -- in limiting its ruling to situations where the question of credibility between the defendant and an accomplice is "closely drawn", the Court in McCoy selected situations where the failure to give an instruction on accomplice testimony would prejudice the defendant, where it would probably "be decisive of the outcome". Grant, supra, 553.

In the present case, it was "plain error" for the trial court to fail to instruct the jury on the unreliability of accomplice testimony, when the issue was "closely drawn". This omission prejudiced Mr. Gonzalez. Given that Woodrow Couch was a key prosecution witness, had the jury

been given an instruction by the court to consider Couch's testimony under different, more stringent, standards than that of other witnesses, and to accept it more cautiously than that of other witnesses, there was a reasonable probability that the jury may not have found Couch's testimony sufficient to show guilt beyond a reasonable doubt.

This Court may therefore reverse, because the error may well have resulted in the conviction of Defendant because the failure to instruct on this fundamental aspect of witness credibility in a case that was "closely drawn", "`seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." Olano, supra, 736-737; People v Carines, supra, 772-773.

B. THE ISSUE OF CREDIBILITY WAS "CLOSELY DRAWN", WHERE WOODROW COUCH WAS A KEY PROSECUTION WITNESS.

In People v McCoy, supra, the Court recognized the inherent untrustworthiness of accomplice testimony and the right of a defendant to a special cautionary instruction regarding the unreliability of testimony from such witnesses.[2] The Court in McCoy ruled that after publication of the opinion, it would be reversible error to fail to give such a cautionary instruction if requested, and "if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction

[2] The majority of other jurisdictions have also recognized that accomplice testimony should be weighed with caution, and that a special cautionary instruction is preferred. See People v Henderson, 568 NE2d 1234 (Ill, 1998); State v Crume, 22 P3d 1057 (Kan, 2001); Derden v State, 522 So2d 752 (Miss, 1998); State v Shelton, 782 A2d 941 (NJ Super App, 2001); Commonwealth v Chmiel, 639 A2d 9 (Pa, 1994); State v Rose, 972 P2d 321 (Mont, 1998); State v Sawyer, 2002 WL 407935 (Ohio App 8 Dist Cuyahoga, 2002); United States v Isaac, 134 F3d 199 (CA 3, 1998); United States v Carr, 5 F3d 986 (CA 6, 1993); United States v Tucker, 169 F3d 1115 (CA 8, 1999); United States v McGuire, 27 F3d 457 (CA 10, 1994).

even in the absence of a request to charge." McCoy, supra, 240.[3] As the Court explained in People v Reed, 453 Mich 685, 692 (1996):

> "This rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. The problem with such testimony is two-fold. First, actual or implied threats or promises of leniency by the prosecutor will often induce an accomplice to fabricate testimony. Second, a jury may rely on otherwise incredible accomplice testimony simply because it is presented by the prosecutor. As the court noted in McCoy, `a long history of human frailty and governmental overreaching for conviction has justified distrust in accomplice testimony.'"

While the holding in McCoy did not specifically define when an issue is "closely drawn", subsequent cases from the Court of Appeals have supplied meaning to this phrase. In People v Gordon Hall, 77 Mich App 528, 531 (1977), the Court of Appeals held that the issue was "closely drawn" where the "sole evidence linking defendant to the offense" was the testimony of the accomplice and the "[d]efendant made a total denial of participation both in the crime and with [the accomplice]." The Court of Appeals found that the trial thus became a credibility contest between the accomplice and the defendant, stating: "We can conceive of no more closely drawn factual issue involving accomplice testimony," and found reversible error. Id. at 531-532. See also People v Jackson, 97 Mich App 660, 666 (1980) [finding issue of guilt "closely drawn" because "[s]ince

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[3] This rule has been extended to allow a trial court to sua sponte instruct a jury, over defense objection, when an accomplice testifies favorably on behalf of the defendant, rather than the prosecution, and the case is "closely drawn." People v Heikkinen, 250 Mich App 322 (2002). As Judge Griffin noted in Heikkinen, supra, 196-197, other courts have found that a trial court has discretion to instruct the jury to accept accomplice testimony with caution, regardless of whether the accomplices' testimony is inculpatory or exculpatory. See United States v Bolin, 35 F3d 306, 308 (CA 7, 1994); United States v Nolte, 440 F2d 1124, 1126-1127 (CA 5, 1971); United States v Urdiales, 523 F2d 1245, 1248 (CA 5, 1975); United States v Simmons, 503 F2d 831, 837 (CA 5, 1974); Booker v Israel, 610 F Supp 1310, 1318 (ED Wis, 1985); United States v Morrone, 502 F Supp 983, 990-999 (ED Pa, 1980), aff'd 672 F2d 905 (CA 3, 1981); State v Anthony, 749 P2d 37 (Kan, 1988); and Hohman v State, 669 P2d 1316, 1322-1323 (Alaska App, 1983); People v Brown, 370 NE2d 814 (Ill, 1977). But see contra Robinson v State, 589 So2d 437, 438 (Fla App,

there were no eyewitnesses to the actual shooting, the question came down to whom to believe, the defendant or the accomplices"]; People v Jensen, 162 Mich App 171, 186-190 (1987) ["The issue is `closely drawn' if the trial is essentially a credibility contest between the defendant and the accomplice"]; People v Fredericks, 125 Mich App 114, 120-122 (1983) [issue is "closely drawn", where the only witnesses linking the defendant to participation in the crime were accomplices]; People v Heikkinen, supra, 337 [issue is "closely drawn", where there were no other eyewitnesses and the trial was a credibility contest].

Other jurisdictions do not use the term "closely drawn", but many have similar if not more stringent requirements. California has a statutory provision that provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." West's Ann Cal Penal Code, §1111. When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices, including the need for corroboration. People v Frye, 959 P2d 183 (Cal, 1998).

In Texas, Article 38.14 of the Texas Code of Criminal Procedure provides that "[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is

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1991); People v Dodd, 527 NE2d 1079 (Ill, 1988); Commonwealth v Jones, 417 A2d 201 (Pa,

not sufficient if it merely shows the commission of the offense." A court's refusal to charge the jury regarding the accomplice witness rule is error. See Selman v State, 807 SW2d 310 (Tex Crim App, 1991).

Under South Dakota law, a defendant is entitled to a special cautionary instruction on the credibility of accomplice testimony. See S.D. Pattern Jury Instructions (SDPJI) 1-14-8. Furthermore, South Dakota law provides that a conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence which tends to connect the defendant with the commission of the offense. S.D. Codified Laws Ann. §23A-22-8 (1994). Failure to give an accomplice testimony and corroboration instruction is prejudicial error. State v Douglas, 16 NW2d 489 (S.D.,1944).

In Washington, the Washington Supreme Court held: (1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies solely on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends on the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction. State v Harris, 685 P2d 584 (Wash, 1984).

In Minnesota, a defendant may not be convicted based solely on the uncorroborated testimony of an accomplice. See Minn.Stat. §634.04 (2000). The general rule regarding accomplice testimony requires courts to caution jurors about the nature of accomplice testimony. See State v

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1980); People v Howard, 263 NE2d 633 (Ill, 1970).

Shoop, 441 NW2d 475, 479 (Minn, 1989). An accomplice instruction need not be given in every criminal case, but "it must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." Id. If it is unclear whether a witness is an accomplice, the jury should make that determination. See State v Flournoy, 535 NW2d 354, 359 (Minn, 1995).

In Ohio, R.C. 2923.03(D), requires a cautionary accomplice instruction when an alleged accomplice of the accused testifies against the accused in a case where the accused is charged with complicity in the commission of an offense. The statute requires the court to inform the jury that an accomplice's testimony affects the credibility of that testimony and leaves that testimony open to grave suspicion. See State v Sawyer, 2002 WL 407935 (Ohio App 8 Dist Cuyahoga, 2002).

In Montana, a jury is to be instructed on all proper occasions that "the testimony of a person legally accountable for the acts of the accused ought to be viewed with distrust." §26-1-303(4), MCA. See State v Rose, 972 P2d 321, 353 (Mont, 1998).

In Louisiana, a cautionary instruction is required when an accomplice's testimony is uncorroborated. State v Castleberry, 758 So2d 749 (La, 1999).

In Oklahoma, a jury instruction concerning the necessity that accomplice witness' testimony be corroborated must be given when a witness meets the definition of an accomplice. Matthews v State, 953 P2d 336 (Okla Crim App, 1998).

In Virginia, the test in determining whether a cautionary accomplice instruction should be granted is whether corroborative evidence is lacking; if it is, the instruction should be granted, and if it is not lacking, the instruction should be refused. Hedrick v Warden of the Sussex I State Prison, 570 SE2d 840 (Va, 2002).

In New Jersey, a defendant is entitled to request a charge that counsels the jury to carefully scrutinize and assess the evidence provided by an accomplice in light of the accomplice's special interest in the case. State v Spruill, 106 A2d 278 (New Jersey, 1954). Further, a judge may give a Spruill charge sua sponte if he or she thinks it is advisable under the circumstances. State v Artis, 269 A2d 1 (New Jersey, 1970); State v Shelton, 782 A2d 941 (New Jersey, 2001).

Under Idaho law, a defendant may not be convicted on the testimony of an accomplice unless that testimony is "corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." I.C. §19- 2117. Where the evidence raises a genuine issue as to whether a witness is an accomplice, the district court must submit the issue to the jury for resolution and instruct the jury accordingly. State v Jones, 873 P2d 122, 131 (Idaho, 1994); State v Emmons, 495 P2d 11, 14 (Idaho, 1972); State v Ruiz, 764 P2d 89, 93 (Idaho, 1988). On the other hand, if it is clear from the evidence that a witness is an accomplice of the defendant, the court should decide the question as a matter of law and inform the jury that the witness is an accomplice. Emmons, supra; In either event, the court must instruct the jury regarding the necessity of evidence to corroborate an accomplice's testimony. Jones, supra; State v Wilson, 457 P2d 433, 439 (Idaho, 1969). As a result, it can be reversible error for the trial court to fail to instruct the jury on the definition of accomplice, on the statutory requirement that the testimony of an accomplice be corroborated, and on the degree and character of corroboration required. State v Lucio, 589 P2d 100, 101 (Idaho, 1979); Wilson, supra; State v Mack, 974 P2d 1109 (Idaho, 1999).

Indiana represents the minority view that a cautionary accomplice instruction is not required. See Tidwell v State, 644 NE2d 557, 559-560 (Ind, 1994).

The federal constitution does not require corroboration, so failure to satisfy a corroboration requirement does not present a constitutional error. See Brown v Collins, 937 F2d 175 (CA 5, 1991). Federal courts to not require corroboration. See United States v Restrepo, 994 F2d 173 (CA 5, 1993); United States v Hayes, 49 F3d 178 (CA 6, 1995); Harrington v Nix, 983 F2d 872 (CA 8, 1993); United States v Necoechea, 986 F2d 1273 (CA 9, 1993). However, a cautionary accomplice instruction is required under certain circumstances. See United States v Gardner, 244 F3d 784, 789 (CA 10, 2001) and United States v Hill, 627 F2d 1052, 1053 (CA 10, 1980)(If the testimony of an accomplice is uncorroborated, the court must give cautionary accomplice instruction); United States v Paniagua-Ramos, 251 F3d 242 (CA 1, 2001)(Where an accomplice's uncorroborated testimony is the only evidence of guilt, an admonition that the testimony must be believed beyond a reasonable doubt, if requested, would be advisable to guide the jury's deliberations.); United States v Tucker, 169 F3d 1115 (CA 8, 1999)(Accomplice testimony is sufficient to support a conviction when it is not incredible or insubstantial on its face, and trial court has no absolute and mandatory duty to advise the jury by instruction that they should consider the testimony of an uncorroborated accomplice with caution.); United States v Bolin, 35 F3d 306 (CA 7, 1994)(Pattern jury instruction regarding caution and great care to be given in considering testimony of accomplice witness who has pleaded guilty is proper in cases where testimony is exculpatory of defendant, as well as inculpatory.); United States v Isaac, 134 F3d 199 (CA 3, 1998)(Immunized witness or accomplice charge is advisable when jury has not otherwise been sufficiently alerted to credibility concerns posed by testimony of witnesses over whom government wields particular power to reward or punish).

Although Michigan does not have a statutory requirement regarding accomplice testimony, this Court should retain and enforce the provisions in McCoy. As this Court has recognized, the McCoy rule is motivated by the inherent weakness of accomplice testimony that is presented by the prosecution. People v McCoy, supra, 236 (quoting 30 AmJur2d, Evidence, §1148, p 323); People v Reed, supra, 691-692. The motivation of an accomplice witness to testify is diverse, and a close examination of the circumstances of each case is necessary in order to determine whether a cautionary instruction is warranted.

Defendant Gonzalez submits that his case was a "closely drawn." The testimony of Woodrow Couch was crucial to the prosecution's case. As a clear line of authority indicates, a case is "closely drawn" when the issue of guilt is a credibility contest. This was the case here. During rebuttal argument, the prosecutor discussed the different time lines suggested by Woodrow Couch and Defendant Gonzalez in his police statement. The prosecutor argued that:

> "Ladies and gentlemen, based on the testimony of Woodrow Couch, Nancy Couch's mother [sic], and Elisa Luna, we have one time line. Based on what Daniel Gonzalez told Detective Paetz in April last year, we have a different time line.
>
> Daniel Gonzalez told her that at about 7:30 on that Friday night, the 13th, at Carol's – Daniel Gonzalez told Detective Paetz neither he, nor Woodrow Couch, left there – left Carol's until Daniel Gonzalez left and walked to Woodrow's house just before 3:00 in the morning. Now, we've got Daniel there all that period of time according to Daniel. According to Daniel, Woodrow is still there because Daniel told Detective Paetz he walked to Woodrow's house, sat on the back porch, and waited for Woodrow to come.
>
> Now, we know at 3:13 a.m. fire call. So according to what Daniel Gonzalez told Detective Paetz, the only conclusion you could come to if you believe that is that Carol was alive when Daniel left and Woodrow killed her because Woodrow was the only one that could have been there. Had somebody else been there, Daniel would

have seen him because he was there until just a few minutes before he saw Woodrow again.

Now, let me ask you this. If Woodrow kills her and he has sex with her – and there's no evidence that he did. In fact, there's evidence that he did not. The DNA says his sperm is not in any part of her body. So if he then kills her, he's got to strangle her, he's got to beat her to a pulp, put bags over her head, hog tie her to the bed after having taken the cords from somewhere, spread charcoal around, spread charcoal lighter fluid or whatever it was around, set fire to the place, and get out of there and get back to his house all in just a few minutes; all from the time Daniel Gonzalez told Detective Paetz he left until he sees Woodrow again on his back porch. Is there enough time in that 10, 15 minutes to do all of that? I doubt it.

Now, the other time line we have is Woodrow, Nancy, and Elisa Luna (274a-276a).

Given the above, the instant case was a "closely drawn" case. There were no eyewitnesses to the offense and there was a resultant danger that in this "closely drawn" credibility contest, Couch would claim an innocent role in the events. This rendered Couch's testimony "inevitably suspect" and the cautionary accomplice instruction was appropriate.

C. THERE WAS EVIDENCE FROM WHICH THE JURY COULD HAVE CONCLUDED THAT WOODROW COUCH WAS AN "ACCOMPLICE".

When a witness should be considered an "accomplice" for purposes of giving a *sua sponte* accomplice instruction, has likewise been considered by the Court of Appeals. In People v Smith, 158 Mich App 220, 229 (1987), the prosecution argued that a witness was not an accomplice in a shooting even though the witness was originally charged with committing the murder. The Court of Appeals held that although the witness did not admit to being an accomplice, "there was evidence from which the jury could have concluded that [the witness] was in fact an accomplice." Id. Because the only witness who testified that the defendant shot the victim was the disputed

accomplice, the Court of Appeals found the issue "closely drawn" and held that an accomplice instruction should have been given *sua sponte*. Id., 230. In addition to not requiring that the accomplice be charged, favorable treatment by the prosecution also is not a prerequisite to a cautionary instruction on accomplice testimony. People v Reed, 453 Mich 862 fn 10.

An accomplice instruction is not warranted when neither side argues that the disputed witness was an accomplice. People v Allen, 201 Mich App 98, 105 (1993); or when there is no evidence that the witness was involved in the offense, People v Ho, 231 Mich App 178, 189 (1998); People v Piper, 223 Mich App 642, 648 (1997); People v Holliday, 144 Mich App 4560, 574 (1985).

In People v Perry, 218 Mich App 520 (1996), aff'd 460 Mich 55 (1999), the defendant and Jason Ricco left the Ricco home to firebomb a neighbor's house. Although Ricco had previously threatened to firebomb the victims' house and had helped make and test the Molotov cocktails, he testified at defendant Perry's trial that he discouraged Perry from throwing the firebomb into the victims' house, that he ran back home, and that he heard two "whooshes" when the Molotov cocktails ignited. Ricco was tried in juvenile court, where he was acquitted of the murders but convicted of arson. On appeal, defendant Perry argued that the trial court erred in giving the disputed accomplice instruction (CJI2d 5.5), instead of the undisputed accomplice instruction (CJI2d 5.4). The Court of Appeals found that the trial court did not abuse its discretion in giving the disputed accomplice instruction (CJI2d 5.5) where there was a factual dispute whether the witness (Ricco) took part in the crimes that the defendant was charged with committing (Ricco never admitted participating in or encouraging the murders and attempted murders of the victims).

Thus, to be entitled to a cautionary instruction, it is not necessary that the witness be an admitted or a proven accomplice. According to CJI2d 5.5, Witness a Disputed Accomplice, if there is evidence that could lead a juror to think that [he/she] took part in the crime the defendant is charged with committing, the jury is to decide if the witness is an accomplice. If it is decided in the affirmative, then the jury is to evaluate that witness's testimony according to the cautions described in CJI2d 5.6, "Cautionary Instruction Regarding Accomplice Testimony."

One of the prosecution's principal witnesses, Woodrow Couch, fit into this category. Although Couch claimed to be home at the time of the offense, there was evidence to lead a juror to believe that Woodrow Couch took part in the offense. First, Couch's own testimony raised the issue of whether he may have aided Defendant in the commission of this crime, as he admitted to going to Ms. Easlick's apartment about 5:00 p.m. and he admitted being with Defendant Gonzalez for most of the evening. The jury could have concluded from the evidence that Couch played a role beyond even that. Second, according to Det. Paetz's testimony, Defendant Gonzalez made a statement indicating that he and Couch were at Ms. Easlick's apartment from 7:30 or 8:00 p.m. until 2:30 a.m., and that when Defendant left the apartment after having sex with Ms. Easlick, Couch remained with the understanding that it was Couch's turn to have sex with Ms. Easlick. During closing argument, defense counsel theorized that Couch had something to hide (271a-272a).

The jury was not obligated to accept Couch's self-serving testimony regarding his participation. The evidence regarding whether Couch was Defendant's accomplice was at least sufficient to submit the question to the jury. Woodrow Couch should have been treated as an "accomplice" for purposes of a cautionary "accomplice" instruction, and instructions on accomplice testimony as a disputed accomplice, CJI2d 5.5 and CJI2d 5.6, should have been given to the jury in

this case, as "there was evidence from which the jury could have concluded that [the witness] was in fact an accomplice". People v Smith, supra, 229.

D. THE FAILURE OF THE TRIAL JUDGE TO GIVE AN ACCOMPLICE INSTRUCTION, WHEN THE ISSUE OF CREDIBILITY WAS "CLOSELY DRAWN", WAS NOT HARMLESS.

Although defense counsel argued in closing argument that Woodrow Couch had "something to hide" (271a-272a), this was not an adequate substitute for a jury instruction telling the jury to judge that accomplice-witness's testimony by more stringent standards from other witnesses. As the United States Supreme Court has stated on more than one occasion, such as in Taylor v Kentucky, 436 US 478, 488-489 (1978), and again in Carter v Kentucky, 450 US 288, 304 (1981): "[A]rguments of counsel cannot substitute for instructions by the court." Such a rule was specifically applied to accomplice instructions by the Court of Appeals in People v Smith, supra, 158 Mich App at 230, where the Court of Appeals held:

> "While defendant's counsel made the jury aware of [the witness's] motivation to lie and the jury received general instructions on witness credibility, we believe such was insufficient given the credibility contest presented here and the strong emphasis placed by the Supreme Court on accomplice instructions in the face of a close fact question that is nothing more than a credibility contest between the defendant and accomplices."

As the Court similarly stated in United States v Bernard, 625 F2d 854, 857 (CA 9, 1980):

> "The Government's theory that the summation arguments of the defendants' counsel adequately admonished the jury to consider accomplice testimony with caution is unpersuasive. A jury's response to instructions from the judge is, and should be, quite different from its response to arguments from counsel. Counsel's argument is neither law nor evidence, and the jury is so instructed."

The error here was not harmless. Reversal is warranted as the error here resulted in the conviction of an actually innocent defendant and seriously affected the fairness, integrity or public

reputation of judicial proceedings. Defense counsel's closing argument was no substitute for an instruction by the court telling the jury that they were to judge Woodrow Couch's testimony by standards different and more stringent than other witnesses. Had the jury been instructed to judge Couch's testimony under more stringent standards, there is a reasonable probability that the outcome of the trial may have been different. Couch's testimony was critical, given its contents, and it also served to buttress the testimony of Brad Johnson. Furthermore, the DNA evidence does not render the error harmless, as Defendant Gonzalez admitted having sex with Ms. Easlick in his statement to Det. Paetz.

Furthermore, the trial court's general instructions on witness credibility were insufficient. Here, the distinction between what the jury was told and what it should have been told is significant. The jury was instructed only in general terms relative to the weight to be given the testimony of witnesses. It should have been specifically instructed that it should view the testimony of Couch, an accomplice, with distrust. An instruction concerning accomplice testimony would have gone to the heart of the defense that Couch was not telling the truth when he said Defendant was involved with the charged offenses.

The Court in People v McCoy, supra, recognized that an instruction on the unreliability of accomplice testimony is so important to a fair determination of guilt or innocence, that it is reversible error to refuse to give it when requested, and that it may be reversible error when a trial judge fails to give it *sua sponte*, even if not requested, when a case is closely drawn. In the present case, the case was clearly a "closely drawn" one. Such an instruction may well have made the difference between a verdict of guilt or innocence in this case. Under such

circumstances, the trial court's failure to give a cautionary instruction on the unreliability of accomplice testimony requires reversal for a new trial.

III. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL FAILED TO REQUEST A CAUTIONARY INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY WITH RESPECT TO THE TESTIMONY OF WOODROW COUCH.

Even if this Court were to determine that the trial court was not obligated to *sua sponte* give a special cautionary instruction on accomplice testimony, reversal would still be required, because trial counsel's failure to request such an instruction as to Woodrow Couch constituted ineffective assistance of counsel.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. Questions of constitutional law are reviewed de novo. People v LeBlanc, 465 Mich 575, 579 (2002). Strickland v Washington, 466 US 668, 698 (1984); Blackburn v Foltz, 828 F2d 1177, 1181 (CA 6, 1987); United States v Span, 75 F3d 1383, 1387 (CA 9, 1996); Gray v Lynn, 6 F3d 265, 268 (CA 5, 1993); People v Ullah, 216 Mich App 669, 684-686 (1996).

B. DEFENSE COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION ON THE UNRELIABILITY OF ACCOMPLICE TESTIMONY, WHEN THE ACCOMPLICE WAS A KEY PROSECUTION WITNESS, AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant in a criminal case has a right to effective assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, §20. A defendant is deprived of effective assistance of counsel if trial counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced as a result. Strickland v Washington, 466 US 668 (1984); People v Pickens, 446 Mich 298 (1994).

To establish prejudice, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case". Strickland, 466 US at 693; Workman v Tate, 957 F2d 1339, 1346 (CA 6, 1992). Rather, the defendant need only show a "reasonable probability" that absent the errors, the outcome may have been different. Strickland, supra, 694.

A defendant is denied effective assistance of counsel where counsel fails to request proper instructions on a viable defense theory, where an instruction on that theory may have made a difference in the outcome of the case. People v McVay, 135 Mich App 617, 618-619 (1984); United States v Span, 75 F3d 1383, 1387 (CA 9, 1996); Gray v Lynn, 6 F3d 265, 268 (CA 5, 1993). Courts from other jurisdictions have found ineffective assistance of counsel where counsel failed to request a cautionary instruction on accomplice testimony, and the accomplice's testimony was largely uncorroborated, but was crucial in determining the question of guilt or innocence. See e.g., Freeman v Class, 95 F3d 639 (CA 8, 1996); Everett v Beard, 290 F3d 500 (CA 3, 2002); People v Campbell, 657 NE2d 87 (Ill, 1995); State v Rose, 972 P2d 321, 323-324 (Mont, 1998); State v McBride, 296 NW2d 551, 553-555 (S.D., 1980); Grooms v State, 320 NW2d 149, 152 (S.D., 11982); Ex Parte Zepeda, 819 SW2d 874, 875-877 (Tex Crim App, en banc, 1991); People v Forbes, 203 AD2d 609 (N.Y, 1994).

In the present case, the defense theory included the claim that Woodrow Couch had something to hide and his testimony should not be accepted by the jury. Trial counsel's failure to request instructions that would have assisted the defendant in pursuing such a defense, constituted ineffective assistance of counsel.

There was no conceivable strategy in failing to seek an instruction in this case regarding the inherent unreliability of Woodrow Couch's testimony. Counsel's failure to request an instruction on accomplice testimony could not be a result of trial strategy, let alone reasonable and sound trial strategy. Defense counsel argued in his closing argument that Woodrow Couch had something to hide (271a-272a). Yet defense counsel never asked the trial court to instruct the jury on how to properly evaluate Couch's testimony.

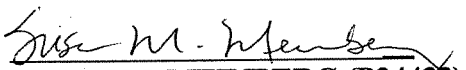
Had the jury been given instructions on accomplice testimony, they would have been instructed that if they determined Woodrow Couch was somehow involved in the commission of the crime, to examine Couch's testimony closely, to be careful about accepting it, and to accept it more cautiously than other witnesses, CJI2d 5.6. These instructions would have told the jury to judge Couch's testimony under different, more stringent standards than other witnesses. Had the jury been given such instructions, they would have been less likely to accept the testimony of Woodrow Couch as proving guilt beyond a reasonable doubt. Given that Couch was a key prosecution witness, there was a reasonable probability that had the jury been given instructions on accomplice credibility, the outcome of the trial may have been different. Even if the trial court did not have a *sua sponte* duty to give a cautionary instruction on accomplice testimony, counsel had an obligation to request one, and his failure to do so amounted to ineffective assistance of counsel. Defendant Gonzalez must be granted a new trial.

SUMMARY AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to reverse his convictions and grant a new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

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